

MARTIN F. McDERMOTT (SBN 6183307 (IL))  
 United States Department of Justice  
 Environment & Natural Resources Division  
 Environmental Defense Section  
 P.O. Box 23986  
 Washington, D.C. 20026-3986  
 Telephone: (202) 514-4122  
 Facsimile: (202) 514-8864  
*Attorney for Defendant*

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

NORTHWEST ENVIRONMENTAL	)	No. C 03 - 05760 SI
ADVOCATES, et al.,	)	
	)	<b>JOINT STIPULATION</b>
Plaintiffs,	)	<b>TO MODIFY THE</b>
	)	<b>COURT'S SEPTEMBER 18, 2006</b>
v.	)	<b>ORDER GRANTING PLAINTIFFS'</b>
	)	<b>MOTION FOR PERMANENT</b>
UNITED STATES ENVIRONMENTAL	)	<b>INJUNCTIVE RELIEF AND RELATED</b>
PROTECTION AGENCY,	)	<b>JUDGMENT; PROPOSED ORDER</b>
	)	
Defendant.	)	
	)	<b>NO HEARING REQUESTED</b>

At the request of Defendant United States Environmental Protection Agency ("EPA"), this joint Stipulation is filed by Plaintiffs Northwest Environmental Advocates, et al. ("Plaintiffs"), Plaintiff-Intervenor States of New York, Illinois, Michigan, Minnesota, Wisconsin, and Pennsylvania (the "States"), Defendant-Intervenor Shipping Industry Ballast Water Coalition, and EPA. Pursuant to Federal Rule of Civil Procedure 60(b) and Local Rule 7-12, all parties in this case hereby stipulate to entry of an order modifying one aspect of the Court's *Order Granting Plaintiffs' Motion for Permanent Injunctive Relief* and the related *Judgment*, filed in this action on September 18, 2006. If approved by the Court, this Stipulation would postpone vacatur of 40 C.F.R. § 122.3(a) from September 30, 2008 to December 19, 2008.

In support of this Stipulation, EPA states the following.

## DISCUSSION

On September 18, 2006, this Court granted Plaintiffs' request for a permanent injunction, remanding this matter to EPA for further proceedings consistent with the Court's orders, and holding that "the blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 C.F.R. § 122.3(a), shall be vacated as of September 30, 2008." This Court's orders on liability and remedy were upheld by the Ninth Circuit Court of Appeals on July 23, 2008. See Northwest Envtl. Advocates v. EPA, Nos. 03-74795, 06-17187, 06-17188, 2008 WL 2813103 (9<sup>th</sup> Cir. July 23, 2008). The Court of Appeals noted that the Department of Justice had informed it by letter dated July 11, 2008, that on June 17, 2008, EPA had published in the Federal Register certain draft "General Permits for Discharges Incidental to the Normal Operation of a Vessel," 73 Fed. Reg. 34,296 (June 17, 2008), and that the public comment period on the draft permits was scheduled to close on August 1, 2008. See 2008 WL 2813103 at \*19. The Court of Appeals further stated: "The letter warns that a final version may not be ready by the September 30, 2008, deadline established by the district court, but the letter stops short of a request to extend the deadline. If the government chooses to request an extension of the deadline, that request should be addressed to the district court." Id. EPA has requested that the parties to this case stipulate to such an extension, and they have done so. Specifically, it is requested that this Court modify its September 18, 2006 injunction and Judgment by postponing its vacatur of 40 C.F.R. § 122.3(a) until December 19, 2008.

This Court has ample authority to grant such relief. Its authority to modify the terms of injunctive relief is inherent, A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9<sup>th</sup> Cir. 2002), and is derived both from its powers in equity and from Rule 60(b), which governs grounds

1 for relief from a final judgment, order or proceeding. Earth Island Inst. Inc. v. S. California  
 2 Edison, 166 F. Supp. 2d 1304, 1309 (S.D. Cal. 2001).

3 Two subsections of Rule 60(b) are relevant here. Subsection (5) of that Rule allows a  
 4 district court to relieve a party from a final judgment or order when “a prior judgment upon  
 5 which it is based has been reversed or otherwise vacated, or it is no longer equitable that the  
 6 judgment should have prospective application.” Under this rule, a court has “discretionary power  
 7 to modify an injunction when changing circumstances, or a better appreciation of the facts in  
 8 light of experience indicate existing injunctive orders are not well adapted to the purpose for  
 9 which they were made.” Central Valley Chrysler-Jeep, Inc. v. Goldstene, No. 04-6663, 2008 WL  
 10 2600786 at \*2 (E.D. Cal. June 24, 2008). See also U.S. Syntex (U.S.A.) LLC v. Apotex Inc., No.  
 11 01-02214, 2005 WL 6042726 at \*2 (N.D. Cal. Oct. 26, 2005) (court retains power to modify the  
 12 terms of its injunction in order to accommodate “changed circumstances”). Subsection (6) of  
 13 Rule 60(b), which allows a court to modify an order for “any other reason that justifies relief,” is  
 14 also relevant. It serves as a “catch-all provision,” conferring the Court with “broad discretion to  
 15 relieve a party from final judgment upon such terms as are just.” Spacey v. Bugar, 207 F. Supp.  
 16 2d 1037, 1048 (E.D. Cal. 2001) (citations and internal quotations omitted).

17 Since this Court entered its injunction in September 2006, there have been important  
 18 developments that militate strongly in favor of extending the date of vacatur of the exclusion  
 19 from September 30, 2008 to December 19, 2008. As detailed in the attached *Declaration of*  
 20 *James A. Hanlon*, Director of the Office of Wastewater Management in EPA’s Office of Water  
 21 (“*Hanlon Decl.*”) ¶¶ 4-21, EPA has undertaken significant efforts to address the scheduled  
 22 vacatur. In particular, EPA proposed for public comment two general permits, a Vessel General  
 23 Permit and a Recreational General Permit, to cover the universe of vessel discharges affected by  
 24  
 25  
 26

the September 30, 2008 vacatur. Although recently enacted legislation renders the Recreational General Permit moot,<sup>1/</sup> Mr. Hanlon explains why rushing to finalize the Vessel General Permit in the 60 days between the close of the comment period on August 1, 2008 and the current September 30, 2008 effective date of vacatur would significantly undermine EPA's ability to issue a permit that is effective and implementable." *Hanlon Decl.* ¶ 24. In addition, he explains EPA's basis for asking the Court to delay vacatur of the exclusion in 40 C.F.R. §122.3(a) until December 19, 2008. *Hanlon Decl.* ¶¶ 22-33. In that regard, he explains that while EPA has made substantial progress toward getting the general permits in place, significant work remains to be done. EPA needs to review and respond to a substantial number of public comments; make appropriate changes to the general permits and its related fact sheet and economic analysis based on those comments; conduct final internal agency and interagency review; and obtain Clean Water Act section 401 certifications and Coastal Zone Management Act consistency determinations from States, Territories, and Tribes. While some of these tasks overlap and will

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<sup>1/</sup> As this Court may be aware, at the end of July 2008, the President signed into law two pieces of legislation that address discharges incidental to the normal operation of a vessel and are relevant to the Court's September 2006 injunctive order. The first, the "Clean Boating Act of 2008," Pub. L. No. 110-288, (1) amends CWA §402 to exempt recreational vessels from the requirement to obtain an NPDES permit for discharges incidental to their normal operation; and (2) requires EPA and the Coast Guard to complete specified actions to put in place regulations imposing appropriate management practices applicable to discharges incidental to the normal operation of recreational vessels. The second law, Pub. L. No. 110-299, generally prohibits EPA or an authorized State from imposing NPDES permitting requirements on commercial vessels less than 79 feet in length and commercial fishing vessels, regardless of size, for a period of two years from enactment. In addition, the second law requires EPA (in consultation with the Coast Guard) to study the impacts of the discharges subject to that moratorium and to submit a report to Congress no later than 15 months from the date of enactment. *Hanlon Decl.* ¶ 22. While these new statutes do render finalization of the Recreational General Permit unnecessary, and do reduce the number of vessels subject to the Vessel General Permit, significant work remains to be done to finalize the complicated Vessel General Permit, which, according to data collected for the Vessel General Permit economic analysis, will still continue to be necessary to authorize discharges from the approximately 50,000 vessels that remain subject to the NPDES permitting requirement. *Hanlon Decl.* ¶ 23.

1 be conducted concurrently, some cannot occur until other tasks are completed. In his  
2 Declaration, Mr. Hanlon sets out EPA's ambitious but achievable schedule detailing those tasks,  
3 and discusses the benefits to the permit that will likely result if this request to modify the Court's  
4 injunction is granted. *Hanlon Decl.* ¶¶ 22-34.

5       Additionally, Mr. Hanlon expresses his concern that without the requested extension of  
6 the vacatur date, EPA "may be in the difficult position of choosing between issuing a permit that  
7 does not adequately reflect consideration of the substantial comment received on the draft permit  
8 and refraining from issuing the permit until our work is complete, thereby leaving the regulated  
9 community without permit coverage as of the date of vacatur." This is a decision with  
10 potentially serious consequences for the regulated community, as vessels whose discharges are  
11 no longer exempt under 40 C.F.R. § 122.3(a) would be subject to the CWA § 301 prohibition  
12 against discharge without an NPDES permit. Violations of that prohibition could subject  
13 dischargers to, among other things, citizen suits under CWA § 505, 33 U.S.C. § 1365, which can  
14 result in imposition of penalties of up to \$32,500 per day per violation. CWA section 309(d), 33  
15 U.S.C. § 1319(d); 40 C.F.R. § 19.4.

## 16 17 CONCLUSION

18  
19 As noted, at the request of EPA, all parties have stipulated to the proposed modification  
20 of the Court's injunction and Judgment to postpone the vacatur of 40 C.F.R. §122.3(a) until  
21 December 19, 2008. The parties respectfully request entry of the attached proposed order  
22 embodying that modification.

23       Respectfully submitted and agreed to this 28<sup>th</sup> day of August, 2008:

24                                   RONALD J. TENPAS  
25                                   Assistant Attorney General  
26                                   Environment and Natural Resources Division

By:

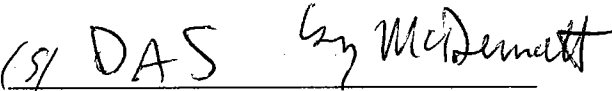


MARTIN F. McDERMOTT, Attorney  
Environment and Natural Resources Division  
Environmental Defense Section  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Phone: (202) 514-4122  
Fax: (202) 514-8865  
*Attorney for Defendant*

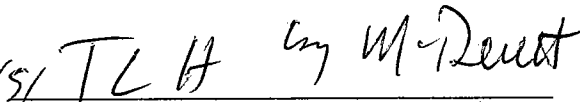
*Of Counsel:*

DAWN M. MESSIER  
Office of General Counsel  
U.S. EPA  
Ariel Rios Building, 2355A  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

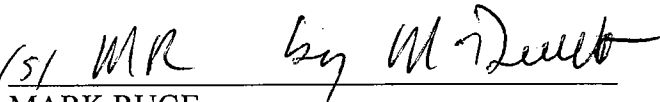
*STIPULATED AND AGREED TO BY:*



DEBORAH A. SIVAS  
Environmental Law Clinic  
Mills Legal Clinic at Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610  
*Attorney for Plaintiffs*



TIMOTHY L. HOFFMAN  
New York State Attorney General's Office  
350 Main Street, Suite 300A  
Buffalo, NY 14202  
*Attorney for the State of New York and on behalf of the Intervenor-States*



MARK RUGE  
K & L Gates LLP  
1601 K Street, N.W.  
Washington, D.C. 20006-1600  
*Attorney for the Shipping Industry Ballast Water Coalition*

**[PROPOSED] ORDER**

Upon consideration of the parties' joint Stipulation requesting modification of this Court's *Order Granting Plaintiffs' Motion for Permanent Injunctive Relief* and related *Judgment*, filed in this action on September 18, 2006, it is hereby ORDERED that the exemption for discharges incidental to the normal operation of a vessel, contained in 40 C.F.R. § 122.3(a), is vacated as of December 19, 2008, rather than September 30, 2008. In all other respects, the Court's previous orders shall remain unchanged and in effect.

DATED: 8/31/08

  
Hon. Susan Illston, United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of August 2008, the foregoing JOINT STIPULATION TO MODIFY THE COURT'S SEPTEMBER 18, 2006 ORDER GRANTING PLAINTIFFS' MOTION FOR PERMANENT INJUNCTIVE RELIEF AND THE RELATED JUDGMENT, and PROPOSED ORDER have been served electronically through the Court's ECF system on counsel of record.

/s/ Martin F. McDermott

Martin F. McDermott